IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JOHNNY C. FENN, JR., #238558	)	
	)	
Plaintiff,	)	
	)	**Civil Action No.: CV-05-515-F**
v.	)	
	)	
MIKE HUGHES, et al.,	)	
	)	
Defendants.	)	

SPECIAL REPORT

COMES NOW the Defendant, Ben Crawley, incorrectly identified by the Plaintiff as James B. Crowley, and respectfully submits his Special Report pursuant to this Court's Order of October 7, 2005, and the Extension of Time granted November 15, 2005.

I. Introduction

The Plaintiff, currently an incarcerated convict, filed a Complaint claiming excessive force was used against him during an arrest. Plaintiff demands that charges for Assault in the Second Degree be dropped as well as compensatory and punitive damages.

The Plaintiff brings a claim for "police brutality", which Defendant construes as a claim of excessive force in violation of his rights under the Fourth or Fourteenth Amendment.

The Plaintiff originally filed suit against Officers James Mueller and Mike Hughes. On October 5, 2005, the plaintiff filed a Motion for Leave to File an Amended Complaint to add Officer Ben Crawley as a party defendant. (Doc. 14). The plaintiff claimed that he "was kinda mixed up with putting the names to the police officers" and specified that he "would like to use Mike Hughes as a witness so I would be able to allow the court to listen to his story but I did say he did open the sheriffs [sic] door with Jim Muller [sic] but it wasn't him it was James B.

Crowley [sic]." (Doc. 14). This Court granted the plaintiff's Motion for Leave to File an Amended Complaint on October 7, 2005. (Doc. 15).

II. The Parties

a. The Plaintiff, Johnny Fenn, was sentenced on April 26, 2005 for Unauthorized Use of a Motor Vehicle, and two counts of Assault Second Degree. Pursuant to the Habitual Felony Offender Act, the court found that Fenn had previously been convicted of Possession of a Forged Instrument Second Degree, Possession of a Forged Instrument Second Degree, Fraudulent Use of a Credit Card, and Receiving Stolen Property. (See attached Sentence Order dated April 26, 2005). He is currently incarcerated in the Bullock County Correctional Facility.

b. Ben Crawley was employed by the Troy Police Department as a Police Officer at all material times hereto. He has been a law enforcement officer for approximately four (4) years.

III. Facts

On October 3, 2004, while on patrol, Officer Crawley heard the Troy Police Department Dispatcher, Kenny Adams, advise that Mr. Johnny Mr. Fenn had an active felony warrant and that he was leaving Pinkard's convenience store on Highway 231 South of Troy in a silver minivan headed towards the Pocossin area. (Affidavit of Ben Crawley). Officer Chuck Railey also received a call of a criminal trespassing at Pinckard's Convenience Food Mart on U.S. Highway 231 South involving Mr. Johnny Fenn. (Affidavit of Chuck Railey). At that time Troy Police Officers Hughes and Mueller were dispatched to that location to make contact with Mr. Fenn. (Affidavit of Chuck Railey). When the officers arrived, the plaintiff had already left. (Affidavit of Chuck Railey). The officers had prior knowledge that this subject lived in this same area off of Parron Church Road. (Affidavit of Chuck Railey). They also had knowledge of a felony probation violation warrant against Mr. Fenn, requesting that he be arrested. (Affidavit of Chuck Railey).

At that time Officer Ben Crawley had taken his unit and gone around toward the Pocosin Road to help set up a containment perimeter. (Affidavit of Chuck Railey). Officer Crawley had his unit on Pocosin Road. (Affidavit of Chuck Railey). While Officer Crawley was on County Road 5518 looking for the suspect, he was pulled over on the right shoulder of the road about one hundred yards off of County Road 5520 when a blue pickup pulled up next to his patrol car. (Affidavits of Ben Crawley and Chuck Railey). The pickup truck was occupied by a white male driver and a black male passenger. (Affidavit of Ben Crawley). The driver began pointing at the passenger and at this time the passenger, Mr. Fenn, jumped out of the passenger side of the pickup truck and started running towards County Road 5520. (Affidavits of Ben Crawley and Chuck Railey). They stayed in the area for several minutes trying to locate the subject. (Affidavit of Chuck Railey). A Pike County Sheriff Deputy Tommy Price advised that he had seen the subject run from behind another trailer, into the woods. (Affidavit of Chuck Railey). The officers tried to set up a perimeter and call for tracking dogs to see if they could locate Mr. Fenn. (Affidavit of Chuck Railey).

Officer Crawley followed Mr. Fenn on foot until he reached the intersection of County Roads 5520 and 5518. (Affidavit of Ben Crawley). At this time Mr. Fenn jumped into a red van that was parked on the side of the road and put the vehicle into reverse and started traveling towards Officer Crawley at a high rate of speed. (Affidavit of Ben Crawley). Mr. Fenn took this van without permission. (Affidavit of Chuck Railey). The owner of the van was present and Officer Crawley yelled at her to move to safety as he was running to avoid being hit by the vehicle driven by Mr. Fenn. (Affidavit of Ben Crawley). When Mr. Fenn put the van into drive and started coming back towards Officer Crawley, he gave a loud verbal command for Mr. Fenn to stop, which he ignored. (Affidavit of Ben Crawley). Mr. Fenn turned right onto County Road 5520 and headed towards U.S. Highway 231. (Affidavit of Ben Crawley). At this time Officer Crawley ran back to his patrol car and pursued Mr. Fenn. (Affidavit of Ben Crawley). Officer Crawley advised on the radio that he had witnessed the subject leaving and that he was in pursuit. (Affidavit of Chuck Railey).

Officer Crawley advised that Mr. Fenn took a right-hand turn onto Parron Church Road, which would take him back out toward U.S. Highway 231, where Officer Railey was located. (Affidavit of Chuck Railey). Officer Mueller was also located in that area. (Affidavit of Chuck Railey). Two Sheriff's Deputies, Sam Mallory and Tommy Price, were also in that area as well as Officer Mike Hughes. (Affidavit of Chuck Railey). Officer Railey met Mr. Fenn on the roadway and tried to get him to stop. (Affidavit of Chuck Railey). He went around Officer Railey's vehicle. (Affidavit of Chuck Railey). Officer Railey turned around and they called out a 10-100 pursuit. (Affidavit of Chuck Railey). Officer Mueller passed Officer Railey and they started up Parron Church Road headed in the direction of U.S. Highway 231, where Officer Hughes, Deputy Price and Deputy Mallory were located. (Affidavit of Chuck Railey). Officers who were ahead of Officer Crawley advised that Mr. Fenn was now traveling south on Highway 231 just north of Brundidge. (Affidavit of Ben Crawley).

In an effort to try to get Mr. Fenn to stop, Officer Hughes and Deputy Price set up a rolling roadblock. (Affidavit of Chuck Railey). They tried to get the subject to stop in the road, but Mr. Fenn refused to stop. (Affidavit of Chuck Railey). At this time he rammed the rear bumper of Officer Hughes' patrol car trying to force him out of the way. (Affidavit of Chuck

Railey). Mr. Fenn was traveling anywhere from thirty-five to forty-five miles per hour. (Affidavit of Chuck Railey). When Mr. Fenn struck Officer Hughes' car he went off the right-hand side of the road and struck a mailbox; came back up onto the road, and struck Officer Hughes' patrol car trying to push Officer Hughes off the road again. (Affidavit of Chuck Railey). Mr. Fenn's van hit Officer Mueller's car. (Affidavit of Chuck Railey). He straightened back up and he proceeded on Parron Church Road into the ditch and up U.S. Highway 231. (Affidavit of Chuck Railey).

Officer Mueller had significant damage to his car, but was still able to continue in the pursuit. (Affidavit of Chuck Railey). Mr. Fenn pulled out in front of traffic and started toward Brundidge, Alabama in disregard of human life. (Affidavit of Chuck Railey). The officers traveled all the way to Brundidge. (Affidavit of Chuck Railey). As the officers approached the main intersection of US Highway 231 and Highway 10 in Brundidge, Mr. Fenn cut across the median and proceeded into the parking lot of the Amoco Station at the intersection of US Highway 231 and Highway 10; and back out onto S.A. Graham Boulevard. (Affidavit of Chuck Railey). The units involved in the pursuit were Officer Railey, the Sheriff's Deputies, Officer Mueller and a Brundidge unit. (Affidavit of Chuck Railey).

As the officers approached the Amoco Gas Station on Highway 231, Mr. Fenn made a left turn into the parking lot of the gas station and continued through the parking lot at a high rate of speed. (Affidavit of Ben Crawley). As Mr. Fenn was pulling out of the parking lot back onto the roadway, he aimed his vehicle and struck Officer Mueller's patrol car on the driver's side. (Affidavits of Ben Crawley and Chuck Railey). At this time Mr. Fenn continued to travel towards Brundidge. (Affidavit of Ben Crawley). When he reached the intersection of Main Street in Brundidge, he took a left turn at a high rate of speed traveling through the parking lot of

Pinckard's Gas Station. (Affidavit of Ben Crawley). Mr. Fenn continued through residential neighborhoods at high rates of speed. (Affidavit of Ben Crawley). At one point he traveled through two residential yards onto another paved road. (Affidavits of Ben Crawley and Chuck Railey). He proceeded down that street back onto Galloway Road and headed back into the direction of Brundidge. (Affidavit of Chuck Railey). While traveling back towards Brundidge he reached speeds again in excess of seventy to eighty-five miles an hour. (Affidavit of Chuck Railey). By this time Officer Crawley was the second unit in the pursuit just behind a Brundidge Police Officer. (Affidavit of Ben Crawley).

A Brundidge Police unit occupied by Officer King stopped his unit in the middle of the street in an effort to try to get Mr. Fenn to stop. (Affidavits of Ben Crawley and Chuck Railey). Mr. Fenn made no effort to go to the left or to the right around his vehicle. (Affidavit of Chuck Railey). He just rammed this police unit head-on, doing significant damage and disabling both vehicles. (Affidavits of Ben Crawley and Chuck Railey). At this time Mr. Fenn got out of the van and started running. (Affidavit of Ben Crawley). Other officers and Officer Crawley followed Mr. Fenn on foot through residential yards and open lots. (Affidavits of Ben Crawley and Chuck Railey). Mr. Fenn was finally caught by Officer Mueller as he was running down the middle of the street. (Affidavits of Ben Crawley and Chuck Railey).

Mr. Fenn was placed in handcuffs and was laying down in the back seat of a Pike County Sheriff's car with his legs still hanging out of the driver's side. (Affidavits of Ben Crawley and Chuck Railey). He was kicking at officers and deputies when Officer Crawley opened the passenger's side door and yelled at him to stop resisting. (Affidavits of Ben Crawley and Chuck Railey). When Mr. Fenn refused, Officer Crawley sprayed him with his Pepper Foam 10% chemical agent. (Affidavits of Ben Crawley and Chuck Railey). Mr. Fenn was treated with bottled water from Officer Crawley's car by using the water to wash his face and eyes. (Affidavits of Ben Crawley and Chuck Railey). Mr. Fenn was then transported to the Pike County Jail. (Affidavits of Ben Crawley and Chuck Railey).

At no time did Officer Crawley strike Mr. Fenn. (Affidavits of Ben Crawley and Chuck Railey). Officer Crawley used only the amount of force which was necessary to subdue Mr. Fenn and gain control of the situation. (Affidavits of Ben Crawley and Chuck Railey). Force was necessary to subdue Mr. Fenn because he posed a threat to himself and others. (Affidavits of Ben Crawley and Chuck Railey).

Mr. Fenn at the scene advised that he did not need any medical attention. (Affidavit of Chuck Railey). He did not have any injuries. (Affidavit of Chuck Railey). Officer Railey did not see any cuts or anything that would have indicated that he was injured. (Affidavit of Chuck Railey). The October 3, 2004 Pike County Jail Admission Record for Mr. Fenn, contains no notation of any injury, marks, or scars. (See attached Pike County Jail Records for Mr. Fenn obtained pursuant to subpoena). On October 9, 2004, Mr. Fenn had an altercation at the Pike County Jail for which he received treatment at the Troy Regional Medical Center. (See attached Pike County Jail Records and Troy Regional Medical Center Records for Mr. Fenn obtained pursuant to subpoena).

IV. Plaintiff's Allegations and Defendants' Response

Ground One: The Plaintiff alleges "police brutality". (See complaint pg. 2; Doc. 14). Although the Plaintiff lists "police brutality" as two separate grounds, it appears from the Complaint that Plaintiff brings one claim for excessive force which is more fully set out in Ground Two. Officer Crawley used only that amount of force which was necessary to subdue

Mr. Fenn and gain control of the situation. Force was necessary to subdue Mr. Fenn because he posed a threat to himself and others.

Ground Two: The Plaintiff alleges "police brutality", stating that after he was detained and placed in the back of a police car, Officer Ben Crawley sprayed him with pepper spray. (See Complaint pg. 3; Doc. 14). The use of Pepper Foam 10% chemical agent to subdue a suspect who had put citizens in danger, and was kicking at officers is reasonable, de minimus force.

V. Analysis of Applicable Law

A. Heck v. Humphrey

The United States Supreme Court, in Heck v. Humphrey, 512 U.S. 477 (1994), held that "a state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated." Edwards v. Balisok, 520 U.S. 641, 643 (1997)(citing Heck v. Humphrey, 512 U.S. at 487)(internal quotations omitted).

In his Complaint, the Plaintiff demands that charges for Assault in the Second Degree be dropped. However, on April 26, 2005, the Plaintiff entered a guilty plea, was found guilty, and was sentenced for two counts of Assault in the Second Degree for ramming the Defendants' police cars during his attempt to evade law enforcement. (See attached Sentence Order dated April 26, 2005). There is no evidence, nor can there be, that Plaintiff's convictions for Assault in the Second Degree have been invalidated. Thus, the Plaintiff's requested relief under § 1983 is unavailable under Heck.

B. Fourth and Fourteenth Amendment Analysis

This Court recently held that "[t]he first line of inquiry in analyzing a § 1983 excessive force claim is to identify the specific constitutional right allegedly infringed by the challenged application of force. Calhoun v. Thomas, 2005 WL 646803 (M.D. Ala. 2005)(Thompson, J.)(referencing Graham v. Connor, 490 U.S. 386, 394 (1989).

> The Fourth Amendment prohibition against unreasonable seizures of the person, the Fourteenth Amendment due process clause, and the Eighth Amendment ban on cruel and unusual punishment all protect an individual's personal security; the plaintiff's status as a person undergoing seizure, a pretrial detainee, or a convicted person determines which constitutional protection is afforded.

Calhoun v. Thomas, 2005 WL 646803 (M.D. Ala. 2005)(Thompson, J.). In the case at bar, the plaintiff was not a convicted person so his claim of excessive force is examined under either the Fourth or Fourteenth Amendment. Judge Thompson noted that "the standards used to evaluate excessive force claims under the Fourth and Fourteenth Amendments differ." Id. "The Fourteenth Amendment Due Process Clause protects pretrial detainees from the use of excessive force that amounts to punishment." Id. Claims of excessive force during an arrest or seizure are viewed under a Fourth Amendment reasonableness standard. See Id.

i. Fourteenth Amendment

The Defendants submit that the Plaintiff's claims are properly analyzed under the Fourteenth Amendment. In Riley v. Dorton, 115 F.3d 1159 (4th Cir.1997), the Fourth Circuit held that excessive force claims of pretrial detainees should be analyzed under the Fourteenth Amendment. The Fourth Circuit noted that Justice Ginsberg in Albright v. Oliver, 510 U.S. 266 (1994):

> wrote separately to argue that the concept of a "continuing seizure" justified applying the Fourth Amendment beyond the point of arrest. She contended that the seizure of a person, as contemplated by the Fourth Amendment, does not end after arrest, but continues as long as the person is "seized" (either in custody or on bail) by

> the government. Justice Ginsberg therefore concluded that Fourth Amendment protections should extend to the end of trial.

Riley v. Dorton, 115 F.3d at 1162. However, the Fourth Circuit refused to adopt Justice Ginsberg's theory of continuing seizure noting that the United States Supreme Court had previously held that "a seizure is a single act, and not a continuous fact." Id. at 1163 (citing California v. Hodari D. 499 U.S. 621, 625 (1991)). The Fourth Circuit went on to note that:

> Several of our sister circuits likewise have declined to adopt the "continuing seizure" concept and continued to apply the Fourteenth Amendment framework of Bell v. Wolfish, [441 U.S. 520 (1979)]rather than the Fourth Amendment to excessive force claims of pretrial detainees. …the Eleventh Circuit likewise recently reconfirmed that "claims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's due process clause. …Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir.1996). …In sum, we agree with the Fifth, Seventh, and Eleventh Circuits that the Fourteenth Amendment does not embrace a theory of "continuing seizure" and does not extend to the alleged mistreatment of arrestees or pretrial detainees in custody.

Id. at 1163-1164. (Internal citations and quotations omitted).

The Fourth Circuit noted that the Fourteenth Amendment seeks:

> [to] balance the rights of prisoners and pretrial detainees against the problems created for officials by the custodial context. The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, accurately depicts the tensions inherent and custodial settings, be they pretrial or post-conviction and the management of a single truculent individual may cause difficulties for a custodian as well. The Eighth and Fourteenth Amendments thus establish only qualified standards of protection for prisoners and pretrial detainees – against cruel and unusual punishment and against excessive force that amounts to punishment respectively. Thus, inherent in the Eighth and Fourteenth Amendments is the principle that: not every malevolent touch by a prison guard gives rise to a federal cause of action. To permit those in custody to bring excessive force claims without any showing of injury would violate that very principle. …Punishment must mean something more than trifling injury or negligible force. Otherwise, every touch would be actionable and

> every alleged push or shove would entitle plaintiff to a trial. This is no idle concern. Those in detention often detest those charged with supervising their confinement, and seek to even the score through the medium of a lawsuit. The Constitution, however, does not exist to scoop up every last speck of detainee discontent. To hold that every incident involving contact between an officer and a detainee creates a constitutional action, even in the absence of injury, trivializes the nation's fundamental document. …Without a *de minimus* threshold, every least touching of a pretrial detainee would give rise to a Section 1983 action under the Fourteenth Amendment. Not only would such a rule swamp the federal courts with questionable excessive force claims, it would also constitute an unwarranted assumption of the federal judicial authority to scrutinize the minutia of state detention activities. The *de minimus* rule thus serves the interest of our federal system by distinguishing claims which are cognizable under the Constitution from those which are solely within the jurisdiction of state courts. An injury need not be severe or permanent to be actionable under the Eighth Amendment, but it must be more than *de minimus*. We think the same rule applies to excessive force claims brought by pretrial detainees.

Id. at 1166-1167. (Internal citations and quotations omitted).

In the present case, the Plaintiff was already seized at the time he claims the alleged excessive force was used. He claims that Officer Crawley used excessive force on him after he had been captured and placed him in the back of a police car for transport to jail. Because the Plaintiff was in police custody at the time he claims to have suffered a constitutional violation, the Fourteenth Amendment standard governs his claim of excessive force.

Under the Fourteenth Amendment analysis, the Plaintiff fails to establish a constitutional violation. There is no evidence that Officer Crawley applied excessive force maliciously or sadistically to cause harm to the Plaintiff. See Eleventh Circuit Pattern Jury Instruction (Civil 2.4.1). Accordingly, the Plaintiff's claim must fail.

ii. Fourth Amendment Analysis

Even if this Court finds that a Fourth Amendment Analysis is appropriate, the Plaintiff still cannot establish a constitutional violation. In order to determine whether the Plaintiff's Fourth Amendment constitutional right to be free from unreasonable seizure was violated, the Court must determine whether Officer Crawley's "actions were 'objectively reasonable' in light of the totality of the circumstances confronting [him], without regard to [his] underlying intent or motivation." Id. Further, "[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham v. Connor, 490 U.S. 386, 396 (1989). Importantly, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." Garrett v. Athens-Clark County, Georgia, 378 F.3d 1274, 1279 (11^{th} Cir. 2004).

Further, the Eleventh Circuit has held that "the application of *de minimus* force, without more, will not support a claim for excessive force in violation of the Fourth Amendment." Nolin v. Isbell, 207 F.3d 1253, 1257 (11^{th} Cir. 2000). Indeed, in analyzing Fourth Amendment excessive-force claims, this Court should "look at the totality of the circumstances, including the severity of the crime at issue, *whether the suspect poses an immediate threat to the safety of the officers or others*, *and whether he is actively resisting arrest or attempting to evade arrest by flight*." Garrett v. Athens-Clark County, Georgia, 378 F.3d at 1279(emphasis added). Indeed, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." Graham v. Connor, 490 U.S. at 396.

In Garrett v. Athens-Clark County, Georgia, 378 F.3d 1274 (11^{th} Cir. 2004), the mother of an arrestee filed suit against police officers who subdued her son with chemical spray and fettered him during the course of his arrest, resulting in his death from positional asphyxia. The district court, which referred to the method of restraint used by the officers as hog-tying, denied the officers' motion for summary judgment on claims of excessive force under the Fourth Amendment. The Eleventh Circuit reversed the denial of summary judgment holding that the officers did not violate the decedent's Fourth Amendment constitutional rights when they subdued him with chemical spray and fettered him by tying his wrists close to his ankles. The Eleventh Circuit noted that "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Id. The Court analyzed "whether the defendants used excessive force by determining whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." Id.

The plaintiff in Garrett argued to the Court that fettering constituted excessive force because the arrestee had been subdued through the use of chemical spray. The Eleventh Circuit rejected this argument holding "[i]n analyzing whether excessive force was used, courts must look at the totality of the circumstances: not just a small slice of the acts that happened at the tail of the story." Id. Thus, the Court held that fettering the arrestee was "within the range of reasonably proportionate responses to the need for force and was not excessive." Id. The Court went on to hold that the officers "took advantage of a window of opportunity-of unknown duration-to restrain [the arrestee] in such a way that he could not harm another officer or himself." Id.

In the case at bar, the plaintiff had been arrested after a prolonged chase by law enforcement. The plaintiff evaded law enforcement officers for over an hour, rammed officers' police cars in an attempt to escape capture, and had stolen a vehicle to aid in his get-away. The plaintiff had been threatening and aggressive towards the Defendants and other officers. The plaintiff actually disabled Officer Hughes' vehicle by ramming it with the van the plaintiff had stolen. The plaintiff was kicking at officers and deputies. Officer Crawley told Mr. Fenn to stop resisting. When Mr. Fenn refused, Officer Crawley sprayed him with Pepper Foam 10% chemical agent. Officer Crawley did not strike the plaintiff. Officer Crawley used that amount of force which was necessary to subdue the plaintiff and gain control of the situation. Under the reasonableness standard of the Fourth Amendment analysis, the actions of Officer Crawley were reasonable and indeed appropriate in the circumstances in order to restore order to an escalating situation.

Officer Crawley simply exerted that amount of force which was necessary to restore order; for Fenn's protection and the protection of Officer Crawley and other law enforcement officers. As such, Fenn fails to identify any deprivation by Officer Crawley of his Fourth Amendment rights to be free from excessive force.

iii. Personal Participation Required for § 1983 Claim

This court has held that "the plaintiff must establish an affirmative causal connection between the act or omission complained of and the alleged constitutional deprivations in order to sustain a § 1983 cause of action against the defendant." Ludlam v. Coffee County, 993 F.Supp. 1421 (M.D. Ala. 1998). There is no causal link between the alleged use of excessive force and Officer Crawley. Officer Crawley only used de minimus force on the plaintiff to subdue him for his own safety and the safety of others. Accordingly, plaintiff fails to meet the standard by which a § 1983 claim can be sustained against the Defendant.

VII. Immunity

Officer Crawley is entitled to immunity in both his official and individual capacities; this analysis addresses Defendant's immunity in both capacities. In addition to qualified immunity, Officer Crawley is entitled to absolute immunity, discretionary function immunity, and state agent immunity from any state law claims that the Plaintiff may have asserted against him[1].

A. Qualified Immunity

Even if the court finds that plaintiff has established a Fourth Amendment claim, the defendant is entitled to qualified immunity on the claims brought against him in his individual capacity. Qualified immunity is designed to allow government officials sued under §1983 to avoid the expense and disruption of trial. Williams v. Gold Allison, 4 F.Supp.2d 1112, 1122 (M.D. Ala.1998)(citing Ansley v. Heinrich, 925 F.2d 1339, 1345 (11th Cir.1991)). Officials performing discretionary functions that do not violate clearly established law are entitled to qualified immunity. Williams, 4 F.Supp.2d at 1122 (citing Lancaster v. Monroe County, Alabama, 116 F.3d 1419, 1424 (11th Cir.1997). Determining the applicability of qualified immunity requires a two-part analysis: (1) the defendant must first show he was performing an act within his discretionary authority, and (2) plaintiff must show that defendant violated clearly established law. Williams, 4 F.Supp.2d at 1122. The first step of the analysis is usually an uncontested issue which courts skip over. Williams, 4 F.Supp.2d at 1123 (citing Lassiter v. Alabama A&M University, 28 F.3d 1146, 1149 (11th Cir.1994) and others). An official need only show that (1) acts were undertaken pursuant to the official performance of his duties, and

[1] In his Complaint, the Plaintiff alleges "police brutality". It is unclear from the allegations whether Plaintiff alleges only excessive force in violation of the Fourth Amendment or state law claims as well. Out of an abundance of caution, the Defendant addresses the immunity to which he is entitled to the extent that any state law claims are alleged.

(2) that such acts were within the scope of the official's authority. Williams, 4 F.Supp.2d at 1122 quoting Jordan v. Doe, 38 F.3d 1559, 1566 (11th Cir.1994).

Discretionary authority means "all actions of the government official that (1) were undertaken pursuant to the performance of his duties, and (2) were within the scope of his authority." Jordan v. Doe, 38 F.3d at 1566(internal quotations omitted)(citing Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir. 1988). Noting the breadth of qualified immunity, the Eleventh Circuit stated that "protection of qualified immunity extends to all but the plainly incompetent or those who knowingly violate the law." Jordan, 38 F.3d at 1565 (internal quotations omitted)(citing Malley v. Briggs, 475 U.S. 335 (1986)).

In Garrett v. Athens-Clark County, Georgia, supra., although the Eleventh Circuit held that police officers did not violate an arrestee's Fourth Amendment right to be free from excessive force when they subdued him with chemical spray and fettered him, the Court went on to hold that:

> out of an abundance of caution, we also conclude that qualified immunity would apply even if the defendants had violated [the arrestee's] right: no controlling case law had settled the applicable law; and given the circumstances, defendants' acts were not so far beyond the hazy border between excessive and acceptable force that every objectively reasonable officer, facing the circumstances, would have known that the acts violated the pre-existing federal law.

Garrett v. Athens-Clark County, Georgia, 378 F.3d at 1281. Similarly, in the case at bar, the Defendants did not violate clearly established law. Officer Crawley witnessed the plaintiff being belligerent and uncooperative. Officer Crawley's actions were objectively reasonable and did not violate any clearly established law.

The Eleventh Circuit held that in order for a plaintiff to prevail against officers in their individual capacities, he must "show that they were personally involved in acts or omissions that resulted in the constitutional deprivation." Hale v. Tallapoosa County, 50 F.3d 1579, 1582 (11th Cir. 1995). Plaintiff fails to establish that the Defendants deprived him of a constitutional right.

Once defendants have established this element of qualified immunity analysis, then plaintiff must prove the defendant violated clearly established law. Williams, 4 F.Supp.2d at 1122. In order to determine whether the law was clearly established, "the relevant, dispositive inquiry…is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Calhoun v. Thomas, supra. at *9(citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). The United States Supreme Court held that a law is clearly established if it gives officials reasonable warning that their conduct constituted a deprivation of a constitutional right. See Hope v. Pelzer, 536 U.S. 730 (2002).

Officer Crawley, at all material times hereto, acted within his discretion to insure and promote the safety and well-being of law enforcement officers on the scene, as well as the well-being of the plaintiff.

B. Discretionary Function Immunity and § 6-5-338 (1975) Immunity

Officer Crawley is entitled to discretionary function immunity. Under Alabama statutory law "every peace officer, … whether appointed or employed as such peace officer by the state or county *or municipality thereof*… shall at all times be deemed to be officers of this state, and as such shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement." Alabama Code § 6-5-338 (a)(1975)(emphasis added). The Eleventh Circuit recognized that "[i]n Alabama, law enforcement officials,…enjoy statutory immunity from suit for performance of any discretionary function within the line and scope of his or her law enforcement duties." Wood v. Kesler, 323 F.3d 872, 883 (11th Cir. 2003)(citing Ala. Code § 6-5-338)(internal quotations omitted). The Court further explained that "[u]nder discretionary-function-immunity analysis, a court first determine whether the government defendant was performing a discretionary function when the alleged wrong occurred; if so, the burden shifts to the plaintiff to demonstrate that the defendant[] acted in bad faith, with malice or willfulness in order to deny [him] immunity." Wood v. Kesler, 323 F.3d at 883.

> Discretionary acts are those acts as to which there is no hard and fast rule as to the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice and involving what is just and proper under the circumstances.

Id. At 883-84.

In the case at bar, Officer Crawley was engaged in discretionary acts when pursuing the Plaintiff who evaded law enforcement officers for over an hour, fled on foot through a residential neighborhood, stole a vehicle, rammed police cars, and kicked at officers. The Plaintiff was accordingly aggressive and threatening to officers, citizens, and himself. Officer Crawley determined that the use of force was necessary to subdue the Plaintiff and exerted only that amount of force which was necessary to restore order. Further, Officer Crawley used pepper spray to restrain the Plaintiff in an effort to ensure his own safety and the safety of others. Accordingly, Officer Crawley is entitled to discretionary function immunity.

C. State Agent Immunity

Officer Crawley is entitled to State Agent immunity pursuant to Ex parte Cranman, 792 So.2d 392 (Ala. 2000). Pursuant to Cranman,

> A State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based up the agent's (1) formulating plans, policies, or designs; or (2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as: (a)making administrative adjudications; (b) allocating resources; (c)

> negotiating contracts; (d) hiring, firing, transferring, assigning, or supervising personnel; or (3) discharging duties imposed on a department or agency by statute, rule, or regulation insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or (4) *exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons*; or (5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.

Ex parte Cranman, 792 So.2d at 405(emphasis added). Because Officer Crawley was engaged in exercising his judgment relating to his duties as a law enforcement officer at all material times hereto, he is immune from civil liability in his individual capacity. Accordingly, the plaintiff's claims against him must fail.

D. Absolute Immunity

Officer Crawley is entitled to immunity under Article I § 14 of the Alabama Constitution of 1901. "When Article I, § 14 Alabama Constitution of 1901, has been violated, a trial court is without jurisdiction to entertain the action and the action must be dismissed." Sholas Community College v. Colagross, 674 So.2d 1311 (Ala. Civ. App. 1995). The Alabama Constitution mandates that "the State and its agencies have absolute immunity from suit in any court." Id. (citing Phillips v. Thomas, 555 So.2d 81, 83 (Ala. 1989)). State officers "in their official capacities and individually, are also absolutely immune from suit when the action is, in effect, one against the state." Colagross, 674 So.2d at 1313 to 1314 (citing Phillips v. Thomas, 555 So.2d at 83). Because the action against Officer Crawley is an action against the state, the plaintiff's claims against him with respect to any state law claims pursuant to Article I, § 14 of the Alabama Constitution of 1901 must fail.

E. Official Capacity Immunity

The United States Supreme Court has held that "a state is not a person within the meaning of § 1983." Will v. Michigan Depart. Of State Police, 491 U.S. 58 (1989). The Court has further held that "§ 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a state for alleged deprivations of civil liberties." Id. The court went on to note that "suit against a state official in her or her official capacity is not a suit against the official but rather is a suit against the officials office." Id. The Court, therefore, held that "neither a state nor its officials acting in their official capacities are persons under § 1983." Id. Because Officer Crawley is a State Official acting in his official capacity, he is not subject to liability pursuant to § 1983.

There was no deliberate indifference by the Defendant. The defendant is a State Official acting in good faith and is immune from suit under Article I, § 14 of the Alabama Constitution of 1901 and in accordance with the doctrine of good faith immunity.

F. Substantive Immunity

The Alabama Supreme Court has held that the "doctrine of substantive immunity may yet be invoked if the official or employee (1) is engaged in the exercise of a discretionary function; (2) is privileged and does not exceed or abuse the privilege; or (3) is not negligent in his responsibility." DeStafney v. University of Alabama, 413 So.2d 391 (Alabama 1981). The Alabama Supreme Court has further noted that state officers or employees are entitled to substantive immunity "if they were engaged in the exercise of a discretionary function." Nance by and through Nance v. Matthews, 622 So.2d 297 (Ala. 1993). The Court noted that Black's Law Dictionary defines discretionary acts as "those acts [as to which] there is no hard and fast rule as to course of conduct that one must or must not take and, if there is [a] clearly defined rule, such would eliminate discretion…one which requires exercise in judgment and choice and involves what is just and proper under the circumstances." Id. (citing Black's Law Dictionary 419 (5th Ed. 1979)). Officer Crawley acted within his discretion when pursuing the Plaintiff, and subduing him with pepper spray when he kicked at law enforcement officers.

VII. Conclusion

The Plaintiff demands compensatory and punitive damages and demands that charges for Assault in the Second Degree, for which he has already been convicted, be dropped. Plaintiff has failed to prove any constitutional deprivation and has failed to set forth any evidence of wrongdoing by Officer Crawley for which relief can be granted.

VIII. Motion for Summary Judgment

The Defendants respectfully request this Honorable Court to treat this Special Report as a Motion for Summary Judgment and grant the same unto the Defendats.

Respectfully submitted this 16th day of December, 2005.

/s/ C. Winston Sheehan, Jr.
C. WINSTON SHEEHAN, JR.
Attorney for the Defendant
Officer Ben Crawley

OF COUNSEL:
BALL, BALL, MATTHEWS & NOVAK, P.A.
2000 Interstate Park Drive, Suite 204
Post Office Box 2148
Montgomery, Alabama 36102-2148
Phone: (334) 387-7680
Fax: (334) 387-3222

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2005, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system. The following person, not registered with the CM/ECF system, was served by U.S. mail:

Mr. Johnny C. Fenn, Jr. (#238558)
Bullock Correctional Facility
Post Office Box 5107
Union Springs, AL 36089

by placing same in the U.S. mail postage prepaid on this the 16th day of December, 2005.

_ /s/ C. Winston Sheehan, Jr. _
OF COUNSEL